Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-461

LOIS H. MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims

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The Petitioner, Lois H. Mitchell, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Claims entered in this proceeding on June 25th, 1975.

OPINIONS BELOW

The Order of the Court of Claims, not yet reported, appears in the Appendix hereto, as do the Decisions of the Civil Service Commission Board of Appeals and Review and the Civil Service Commission Regional Appeals Examiner.

JURISDICTION

The judgment of the Court of Claims was entered on June 25th, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether a Federal Government agency's refusal to allow Petitioner, an employee of the agency, to examine materials which formed the basis of a demotion of Petitioner constitutes a violation of procedural due process rights guaranteed by the fifth amendment to the Constitution of the United States.

2. Whether the adverse action proceeding against Petitioner was conducted in such a way as to create an irrebuttable presumption, thereby violating fifth amendment due process rights.

3. Whether Petitioner's demotion was effected in violation of applicable adverse action regulations.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Section 752.104(a) of Title 5 of the Code of Federal Regulations provides, in pertinent part:

> "An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service."

Section 752.201(b)(4) of Title 5 of the Code of Federal Regulations provides, in pertinent part:

> "This subpart applies to:
>
> * * * * *
>
> (4) Reduction in rank or pay. . . ."

Section 752.202(a)(1) of Title 5 of the Code of Federal Regulations provides, in pertinent part:

> ". . . an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action."

Section 752.202(a)(2) of Title 5 of the Code of Federal Regulations provides, in pertinent part:

> ". . . (T)he material on which the notice [of proposed adverse action] is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigating reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material."

STATEMENT OF THE CASE

Ms. Mitchell began her government service in September, 1940. She was a non-probationary grade GS-6, Step 9 Tax Examiner employed by the Internal Revenue Service at the Southeast Service Center located in Chamblee, Georgia. Ms. Mitchell's job was to review those tax returns (cases) assigned to her which had previously been determined to be in error. Ms. Mitchell analyzed the return and adjusted it for error.

In a letter dated March 17, 1972 to Ms. Mitchell the IRS proposed adverse action indicating she would be de-

moted from GS-6, Step 9 to GS-4, Step 9. 5 C.F.R. § 752.101 *et seq*. The reasons articulated for the reduction were generally that Ms. Mitchell processed too few tax returns and made too many errors on those cases she did process. Appendix A-20.

The notice failed to provide Ms. Mitchell with information whereby she could identify the number of cases relied on by the agency in proposing adverse action. In addition, the notice failed to indicate how or why Ms. Mitchell's actions constituted error.

Pursuant to 5 C.F.R. § 752.202(a)(2) Ms. Mitchell requested all evidence used by the agency in formulating the notice: the materials requested included *inter alia* the actual tax returns processed by Ms. Mitchell during the time period covered by the notice and the IBM cards attached to each tax return called "control cards."[1] Ms. Mitchell explained that this basic information was needed to verify her position that she actually processed more tax returns and committed fewer errors than alleged in the March 17, 1972 letter.

The Internal Revenue Service rejected Ms. Mitchell's request stating that the actual cases and control cards were not used in preparing the letter of proposed adverse action. The IRS instead furnished information which was based on an analysis of the cards and cases:

1. Summary on a daily basis of hours worked, volume, and gross number of errors for the period May 7, 1971 through June 30, 1971;

2. Summary of production by quarters for the period September 30, 1970 through September 30, 1971;

3. Summary of production on a weekly basis for October and November, 1971;

4. Summary of weekly error rate for the period ending September 30, 1971;

5. Summary of daily errors for September 4, 1971 through November 2, 1971;

6. The daily reports initially prepared by Mrs. Mitchell (Form 3081's) which reveal the number of cases completed on a particular day;

7. Weekly "IMF Status Report" for weeks ending May 7, 1971 through November 6, 1971;

8. Information memos on a daily basis from May 7, 1971 through November 2, 1971 concerning assignments, number of errors made, and number of cases completed;

9. Cover sheets on a daily basis from May 7, 1971 through November 2, 1971 which briefly outline the errors committed and state the number of cases completed.

Ms. Mitchell renewed her request for the cases and control cards at the oral reply indicating that all material furnished by IRS was summary in nature thereby prohibiting an effective oral reply. The request was again denied.

By letter dated June 27, 1972, Ms. Mitchell was reduced in grade from GS-6 to GS-4. Both Charges and all Specifications except Charge II, Specification 2 were sustained. Ms. Mitchell appealed the decision of the IRS to the Civil Service Commission (CSC). Ms. Mitchell renewed her re-

[1] Each return assigned to an employee is given a separate number. The number is recorded on the return and on the card. In addition, the card carries a recordation of what action is taken by which employee concerning the return. Once the case is closed, the only method of identifying who worked on the case is to examine the cards. Therefore, Ms. Mitchell needed the cards to identify which cases she worked. In addition, Ms. Mitchell often made comments on the cards which would have helped her to reconstruct what she did on a particular case.

quest prior to and during the hearing conducted by a CSC Examiner. She stated that the information requested was the basis for the summary information actually furnished. Ms. Mitchell's appeal was rejected and the request for the cases and control cards denied: ". . . we conclude that the actual cases and the control cards for each of the cases processed by the appellant are not necessary to defend against the Charges." Appendix A-10.

The Examiner's decision was appealed to the CSC Board of Appeals and Review with the issue of the denial of access to the cases and computer cards again raised and rejected. Appendix A-6.

Review of the Board's decision was sought by means of filing a Petition with the U.S. Court of Claims. Pursuant to 23 U.S. Code § 1491, Ms. Mitchell sought back pay and reinstatement to her former position. She argued again, that the failure to provide the cases and control cards violated procedural due process requirements and applicable regulations. The Court of Claims rejected both arguments:

> "The failure to furnish the cases and control cards to plaintiff was not a violation of the regulations." Appendix A-2.
>
> * * * * *
>
> "Under the guidelines laid down by the Supreme Court in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the proceedings under which plaintiff's demotion was effected complied with the due process requirements of the Fifth Amendment." Appendix A-3.

It is this decision of the Court of Claims which Ms. Mitchell seeks to have reviewed by this Court.

REASONS FOR GRANTING THE WRIT

I. THE ORDER OF THE U.S. COURT OF CLAIMS CONFLICTS WITH DUE PROCESS PRINCIPLES ESTABLISHED BY THE UNITED STATES SUPREME COURT AND RAISES SIGNIFICANT AND RECURRING PROBLEMS FOR FEDERAL GOVERNMENT EMPLOYEES WHO WISH TO RESPOND EFFECTIVELY TO A LETTER OF PROPOSED ADVERSE ACTION.

The Order of the Court of Claims allows an agency to provide summaries of information while withholding primary evidence relied on when preparing the summaries. It is contrary to due process principles established by this Court and the holding has serious ramifications for all federal employees who wish to challenge a proposed adverse action. Further, the holding raises a procedural due process issue concerning the adequacy of the notice and hearing in adverse action proceedings not resolved by this Court in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974).[2]

It is uncontroverted that Ms. Mitchell, as a non-probationary employee of the federal government, had a property interest in her status as a GS-6, Step 9, Tax Examiner.[3] *Arnett* v. *Kennedy, supra.; Board of Regents* v. *Roth,* 408 U.S. 564 (1972); and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The question therefore becomes: What procedural protections are attached to that interest pursuant to the Fifth Amendment?

It is well established that the specific procedures required to satisfy due process requirements will vary from case to case, depending on the competing interests of the govern-

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[2] *Arnett* concerns the issue of whether a federal employee is entitled to a hearing prior to termination. The case does not consider the issue of whether application of the adverse action regulations conforms with due process requirements.

[3] 5 C.F.R. § 752.104(a) provides, in pertinent part, that "An agency may not take an adverse action against an employee . . . except for such cause as will promote the efficiency of the service." 5 C.F.R. § 752.201(b) includes a reduction in pay as an adverse action. Hence, these regulatory provisions provide the identical property right as this Court in *Arnett* v. *Kennedy* held was created by 5 U.S.C. § 7501, which contains virtually the same language as does 5 C.F.R. § 752.104 (a).

ment and the individual peculiar to each case. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961). However, it is also well established that some form of notice to an individual of a contemplated government action, coupled with an opportunity to be heard concerning the action, is essential to any consideration of whether due process has been accorded. *Boddie* v. *Connecticut,* 401 U.S. 377 (1971); *Goss* v. *Lopez,* 419 U.S. 565 (1975). Further, this notice and opportunity to be heard must be accorded in a meaningful manner. *Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

While these general principles are well established, it is the decisions of this Court which have given specificity to the requirement of meaningful notice and hearing which the Court of Claims decision contradicts. In *Morgan* v. *U.S.,* 304 U.S. 1 (1938), the Secretary of Agriculture was empowered, by statute, to fix the rates of market agencies at stockyards, pursuant to a "full hearing." In that case a hearing was held, but the Government made no substantive argument, failed to file a brief, and issued no proposed findings of fact. This Court held that such governmental conduct did not provide the person to be affected by the impending government action with any basis for notice as to the government's position on the rate question, thereby precluding an effective argument or appeal. This Court held in part that a hearing, in order to satisfy due process requirements, must include more than just a review of evidence by the administrative decision-maker. The right to be heard "embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one." *Morgan,* 304 U.S. at 18.

The right to examine the material which forms the basis for the Government action was further articulated in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). The Court cited *Green* v. *McElroy,* 360 U.S. 474 (1959) for the proposition that

procedural due process requires the Government to reveal its case to an individual so that the individual has the knowledge to challenge the action:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on factfindings, *the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . (T)his is important in the case of documentary evidence. . . .*
>
> This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny." *Greene,* 360 U.S. 474, 496-497 cited in *Goldberg* v. *Kelly,* 397 U.S. 254. (Emphasis added).

A similar result was reached by this Court in *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969), wherein the above-stated principles in *Greene* were cited as support for a holding that due process rights had been violated.

The application of these principles to Petitioner leads to a conclusion that due process requires that the cases and computer cards should have been made available to Ms. Mitchell, and for this reason the Court of Claims committed error in its holding. Clearly, if Ms. Mitchell was to "know the claims of the opposing party," in such a way as to be able to meet them, as required by *Morgan, supra.,* then it was incumbent on the IRS to make available to her those materials which were the very basis for the agency action; namely, the cases and their accompanying control cards. Specifically, the agency contended that her productivity and error rate on cases she had processed were unsatisfactory, while Ms. Mitchell claimed in part that she had actually worked more cases and made fewer errors than

alleged, and that the cases she processed were more complex than the average case. If Ms. Mitchell is correct, there is no basis for the adverse action. Therefore, denial of access to the cases and cards constituted a denial of the kind of opportunity to respond to the government's position as was contemplated by *Morgan, supra.*

Likewise, *Greene, Goldberg,* and *Jenkins, supra.,* expressly hold that "The evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue," *Greene, supra.,* at 496; and that such an opportunity "is a fundamental aspect of procedural due process," *Jenkins, supra.,* at 428. Nor is there anything in these cases to indicate that the "evidence used to prove the government's case" is limited solely to what the government claims such evidence to be. Where a charge is made that an employee processes too few cases and makes too many errors, then the primary evidence of such charges must be held to be the cases themselves.

Furthermore, the Court of Claims holding creates serious and recurring problems for federal government employees who wish to exercise their right to respond to notices of proposed adverse action. Under this holding an agency could in good faith prepare erroneous summaries and reports of an employee's work to use as the basis for an adverse action, and deny the employee access to the only material that could be used to rebut the charges. Such an abuse of due process is not justified by the assertion that it is administratively burdensome to provide such materials. Administrative convenience is not controlling where due process rights hang in the balance. "(T)he Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois,* 405 U.S. 645, 656; *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); cf. *Taylor* v. *Hayes,* 418 U.S. 488 (1975).

The decision below, conflicting as it does with due process principles established by this Court, and presenting problems to federal employees covered by adverse action procedures, not resolved in *Arnett, supra.,* should be reviewed by this Court by means of a writ of certiorari.

II. THE ORDER OF THE U.S. COURT OF CLAIMS VIOLATES PROCEDURAL DUE PROCESS RIGHTS IN THAT IT ALLOWS AN AGENCY TO TAKE ADVERSE ACTION BASED UPON A PRESUMPTION WHICH IS IRREBUTABLE.

An employee may not suffer an adverse action unless it is "for such cause as will promote the efficiency of the service." 5 C.F.R. § 752.104(a). The Government action is posited on the presumption that an employee with an error rate of more than 3% or a production rate of 85% less than the group average is not performing at a level sufficient to "promote the efficiency of the service." So long as the Government's presumption is subject to rebuttal at an evidentiary hearing, procedural due process guarantees are fully met. However, the Government, by its actions, rendered the presumption irrebuttable.

It was Ms. Mitchell's contention that the standards were not applicable to her because she was assigned more difficult cases and assigned smaller batches of cases than other employees. Ms. Mitchell could prove these facts *only* if she had the cases and control cards. Yet, the Government furnished only that information (the summaries) which supported its presumption. As a result of the withholding of all primary information, the Government by its actions made the presumption irrebuttable.

This Court has held that where the Government seeks to achieve even desirable ends through the use of irrebutable presumptions, due process guarantees are violated. In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the State of Illinois sought to achieve the perfectly proper goal of sep-

arating minors from neglectful parents. Statutory enactments in this connection defined "parent" so as to exclude unwed fathers, which the state felt were generally "unfit." As a result, unwed fathers were provided absolutely no opportunity to rebut the state's charges.

In holding the statute to be unconstitutional, this Court stated that although "procedure by presumption" was a more expeditious method than "individualized determination," it is constitutionally improper where it "forecloses the determinative issues . . ." of the matter in controversy. *Stanley,* 405 U.S. at 657.

This Court has generally had before it irrebutable presumptions created by statute or regulation. *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Stanley* v. *Illinois, supra.* However, the rule is no less applicable to a situation where an agency by its actions renders a presumption irrebutable.

In this case, unlike *Carrington, LaFleur* and *Stanley,* the creation of the presumption was not invalid at the inception because Ms. Mitchell had a theoretical opportunity to rebut the presumption at her oral reply and at her hearing. However, the information necessary to rebut the presumption was in the hands of the Government and not released. Therefore, the evidentiary hearing was an empty ritual because the Government by administrative fiat foreclosed all possibility of rebutting the presumption. When this occurs, *Carrington, LaFleur* and *Stanley* state that a violation of due process has occurred.

One elemental benefit of an evidentiary hearing is to provide the accused with an opportunity to rebut the allegations of the Government. This basic due process protection has been eliminated by the action of the Government, and a writ of certiorari to review the Court of Claims decision to the contrary is therefore merited.

III. THE DECISION OF THE U.S. COURT OF CLAIMS CONFLICTS WITH THE REGULATIONS APPLICABLE TO PROCESSING ADVERSE ACTIONS.

This Court has consistently recognized the obligation of the Government to respect and enforce regulations which it has promulgated. *United States* v. *Nixon,* 418 U.S. 683 (1974); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957); and *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1953). More specifically, in *Service* v. *Dulles, supra.,* and *Vitarelli* v. *Seaton, supra.,* this Court held that the discharge of a federal employee must be in conformance with applicable regulations. The Court emphasized this point in *Vitarelli* v. *Seaton, supra.,* when it stated:

> "[D]epartures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities. For in proceedings of this nature, in which the ordinary rules of evidence do not apply . . . and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance." *Vitarelli,* 359 U.S. at 540.

In this case, the agency has failed to comply with 5 C.F.R. 752.202(a)(2) and 5 C.F.R. 752.202(a)(1).

A. The Notice Of Proposed Adverse Action Issued By The IRS Did Not Comply With The Regulatory Requirements Contained In 5 C.F.R. 752.202(a)(2).

The Regulations of the Civil Service Commission in Title 5 of the C.F.R. defines the obligation of the agency to furnish information to an employee subject to a letter of proposed adverse action:

> "(T)he material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review." 5 C.F.R. 202(a)(2).

The regulation is without qualification: the material on which the notice is "based" must be furnished to the employee. And if the agency fails to follow the regulation, Ms. Mitchell's adverse action may not stand. *Vitarelli* v. *Seaton,* 359 U.S. 535, 545 (1959); *Service* v. *Dulles,* 354 U.S. 363, 388-389 (1957).

In this case, there can be no dispute that the cards and cases were used to generate the summaries furnished to Ms. Mitchell. For example, Ms. Mitchell's supervisor testified that she collected all control cards for the time period covered by the notice and that she directed the individual who reviewed Ms. Mitchell's work to make a list based on the control cards of all cases completed by Ms. Mitchell each day.

In addition to using the control cards, the cases actually completed were also used. The lists summarizing each day's work were based on a specific counting of each case completed together with an examination and verification by the supervisor that an error was committed.

The agency (with the intent of preparing the letter of proposed adverse action) examined the cases and generated lists from the control cards; the IRS maintained summary sheets or lists in the form of "information memos"; and the agency further summarized the information contained in the cases and control cards in the form of charts. The agency furnished all of the summaries, yet withheld the root of the material—the cases and control cards.

The Court of Claims justifies summary information on

the basis that 400 pages of information were furnished.[4] However, compliance with the Regulation may not be measured in the volume of information furnished; if it was "based on" the cards and cases, it must be furnished. And what Ms. Mitchell has shown is that without the cases and control cards, there can be no "lists" or "summaries" or "charts." Therefore, *ipso facto* the cases and cards were the basis of the notice issued by the agency.

As a result, the decision of the Court of Claims is in error.

B. The Notice Of Proposed Adverse Action Issued By Respondent Did Not Comply With The Regulatory Requirements Contained In 5 C.F.R. 752.202(a)(1).

Respondent was obligated by 5 C.F.R. 752.202(a)(1) to provide Petitioner with a specific and detailed notice of the charges. This requirement has been interpreted by the courts to mean that the notice must be sufficiently specific and detailed to give the employee a fair opportunity to respond to the charges. *Money* v. *Anderson,* 208 F.2d 34 (D.C. Cir. 1953); *Burkett* v. *United States,* 402 F.2d 1002 (Ct. Cl. 1968). In *Burkett,* the employee was charged with making malicious statements about his immediate supervisor. The Court found that even though the notice generally informed the employee of the allegations against him, it was not sufficiently specific and detailed because it didn't adequately recite the statement made by the employee, it did not cite specifically to whom the alleged malicious statement was made and it did not cite why the statement was malicious or what harm the employee intended to inflict on his immediate supervisor. The Court of Claims concluded that " 'facts and circumstances of a particular case are regarded as important in such an inquiry.' " *Burkett,* 402 F.2d 1004, citing *Englehardt* v. *U.S.,* 125 Ct.Cl. 603, 606 (1953).

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[4] "The material which defendant relied on and upon which the notice was based, was assembled and made available to the plaintiff; it consisted of approximately 400 pages." Appendix A-1.

The notice provided to Petitioner did not state the facts and circumstances with sufficient particularity to satisfy the regulatory requirements. As in *Burkett,* the notice generally informed Ms. Mitchell of the allegations but there was insufficient particularity to form a response.

The agency contends that Ms. Mitchell's error rate was in excesss of acceptable quality standards. The three specifications merely state her error rate and the acceptable maximum error rate. However, the specifications contain no information with respect to the specific errors made by Ms. Mitchell. This information is vitally necessary if Petitioner is to be provided with a meaningful opportunity to challenge the IRS's claim that specific errors were made. The importance of this information is highlighted by the fact that in those instances where Ms. Mitchell was able to reconstruct the alleged error she was able to refute them.

In sum, this Court has determined that the Government must "scrupulously" adhere to applicable regulations when taking adverse action against a federal employee. *Vitarelli* v. *Seaton, supra.* The IRS failed to provide Petitioner with a sufficiently specific and detailed notice as required by 5 C.F.R. 752.202(a)(1). Thus, the adverse action taken against Ms. Mitchell is defective, and issuance of a writ of certiorari to review the Court of Claims decision to the contrary is warranted.

CONCLUSION

For the reasons set forth hereinabove this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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October Term, 1975

No.

LOIS H. MITCHELL,

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v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of September, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX June 25, 1975

IN THE UNITED STATES COURT OF CLAIMS

No. 16-74

LOIS H. MITCHELL

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* Markey, *Chief Judge,** and LARAMORE, *Senior Judge.*

ORDER

This case comes before the court on plaintiff's motion for summary judgment and defendant's cross motion for summary judgment. Upon consideration of the motions of the parties, after hearing oral argument, and after reviewing the lengthy administrative record in this case, the court finds:

(1) The Civil Service Commission correctly concluded that the adverse action against plaintiff was accomplished in compliance with the applicable statute (5 U.S.C. § 7501) and the governing regulations (5 C.F.R. § 752.202 and FPM Supplement 752-1, 54-1(2)). The regulations required only that the agency assemble and make available to plaintiff the material on which the notice of the proposed adverse action was based and which was relied on to support the charges. The material, which defendant relied on and upon which the notice was based, was as-

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* Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation pursuant to 28 U.S.C. § 293(a).

sembled and made available to the plaintiff; it consisted of approximately 400 pages. In the oral reply to the charges, plaintiff acknowledged that the notice of adverse action was not based on the control cards or the cases processed by plaintiff. The failure to furnish the cases and control cards to plaintiff was not a violation of the regulations.

(2) The charges set forth in the notice to plaintiff were sufficiently specific and detailed to meet the requirements of 5 C.F.R. 202 (a)(1). *See Burkett* v. *United States,* 185 Ct. Cl. 631, 402 F.2d 1002 (1968). The administrative finding that plaintiff sufficiently understood the charges to afford her a fair opportunity to present her defense against the reasons given for the proposed action is supported by substantial evidence. *See Schlegel* v. *United States,* 189 Ct. Cl. 38, 416 F.2d 1376 (1969), *cert. denied,* 397 U.S. 1039 (1970). The record shows that plaintiff's oral reply to the charges when transcribed consisted of 60 pages of typewritten matter, and she offered a large number of documentary exhibits.

(3) The findings of the Civil Service Commission that the agency used the same standards for measuring plaintiff's performance as were used for other examiners; that plaintiff was advised of the standards, and that they were not unreasonable are supported by substantial evidence. The record shows that the standards were set forth in three warning notices of inefficiency and in a progress report which were sent to plaintiff before the adverse action was taken.

(4) Although the evidence was conflicting on many of the factual issues, there is substantial support in the evidence for the findings of the Civil Service Commission that the proof sustained the charges that plaintiff had failed to meet acceptable production requirements and that her error rate was in excess of acceptable quality requirements. The administrative finding that the evidence which plaintiff offered in mitigation of the charges was not sufficient to justify her failure to meet acceptable standards is also supported by substantial evidence.

(5) The Regional Office, as well as the Board of Appeals and Review of the Civil Service Commission, found that the agency's failure to provide plaintiff access to the cases and control cards did not prevent or deny her the right to adequately refute the charges in her oral reply or at the Regional Office hearing. In view of plaintiff's participation in the review of errors assigned to her, her extensive oral reply, the evidence she adduced at the hearing, and the record as a whole, the administrative findings are supported by substantial evidence. Under the guidelines laid down by the Supreme Court in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the proceedings under which plaintiff's demotion was effected complied with the due process requirements of the Fifth Amendment.

Based on the foregoing, the court conludes:

(A) Plaintiff was accorded the rights granted to her by the statute and the administrative regulations.

(B) The decision of the Civil Service Commission is supported by substantial evidence and is neither arbitrary nor capricious.

(C) In the proceedings leading to her demotion, plaintiff was accorded due process, and there was no violation of her Constitutional rights.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

BY THE COURT

Chief Judge

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW

Washington, D. C. 20415

DECISION

IN THE MATTER OF

TYPE CASE: *Removal*

Lois Mitchell

INTRODUCTION

Appellant, through her representative, appealed from the decision issued January 31, 1973 by the Commission's Atlanta Regional Office sustaining the action of the Internal Revenue Service Center, Chamblee, Georgia, in demoting the appellant from the position of Tax Examiner, GS-6, Step 9, $10,329, to the position of Tax Examiner, GS-4, Step 10, $8,506, effective July 9, 1972.

STATEMENT OF CASE

By letter dated March 17, 1972 the appellant was given an advance notice of proposed adverse action (demotion) based on two charges, a failure to meet acceptable production requirements and an error rate in excess of acceptable quality requirements. The proposal letter cited three (3) specifications under each charge in support of the proposed demotion.

The appellant made an oral reply to the charges on March 10, 1972 and certified the transcript of the oral reply with its corrections on June 14, 1972. No written reply was submitted.

Following consideration of the oral reply, the agency issued a decision sustaining all but the second specification in

Charge II and informing the appellant that she would be changed to lower grade and reassigned on July 9, 1972.

COMMISSION'S FIRST LEVEL DECISION

The appellant submitted an appeal dated July 6, 1972 to the Commission's Regional Office. A hearing was held before a Commission representative on November 2 and 3, 1972.

In its decision, the Region found that the agency had complied with the procedural requirements of Part 752, Subpart B, of the Civil Service Regulations in effecting the appellant's change to lower grade.

As to the merits, the Region found that Charge I, as supported by specifications 1, 2, and 3 and Charge II, as supported by specifications 1 and 3 were sustained by the evidence. The Region did not consider specification 2 of Charge II which was not sustained by the agency. The Region found that based on the sustained charges and the specifications supporting each charge, appellant's demotion was not unreasonable, arbitrary, or capricious and was for such cause as would promote the efficiency of the service.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

The appellant through her representative submitted representations under date of April 12, 1973, which are in the main a restatement of those submited to and considered by the Region. The appellant contends that since she was denied access to control cards and cases in the possession of the agency which were relied upon by the agency to support the demotion, she could not adequately refute the charges and thus the hearing before the Region was incomplete. She also contends that the agency has failed to offer any evidence that the "standard" used to evaluate her performance was a uniform standard. She further contends that cases performed by her were not credited to her ac-

count and errors charged were not in fact errors and that she was the subject of discriminatory treatment by her supervisor, which lowered her production and increased her errors.

The agency submitted its rebuttal under date of May 18, 1973, commenting on appellant's contentions and requesting that the Board affirm the Region's decision.

ANALYSIS AND FINDINGS

The Board has reviewed the record developed and relied upon by the Region to determine whether, in the light of that record and in view of the representations to the Board, the Region was correct in concluding that the action effected in appellant's case was in accordance with the applicable adverse action procedures and whether on its merits the action was for such cause as to promote the efficiency of the service.

The Board finds, as did the Region, that the contention that the agency's failure to provide the appellant access to actual cases and case control cards denied her the right to adequately refute the charges in her oral reply and at the Regional hearing is unsupported by the evidence in the record. Moreover, it is clear that the appellant understood the charges suffiicently to afford her a fair opportunity to present her defense against the reasons given for the proposed action. This is evidenced by the appellant's lengthly oral reply to the proposed demotion before the agency issued its final decision. The Board finds that appellant's rights were not violated and that the agency complied with the procedural requirements of Part 752, Subpart B, of the Civil Service Regulations in demoting the appellant.

In regard to the appellant's contentions that the agency's standard used to evaluate her performance was unreasonable and was not uniformly applied to other Tax Examiners, the Board finds that the evidence shows that the agency used the same standards for all examiners in measuring their performance and that the appellant was advised of this standard. In addition, the Board agrees with the Region that the standard was not unreasonable. The appellant has contended that she did not receive credit for cases worked and was mistakenly charged with errors; however, it is evident after a careful review of the evidence that appellant's repetitive errors in working cases and her need for an excessive amount of supervisory guidance showed that she was not performing satisfactorily. Moreover, the appellant's supervisory personnel and reviewers stated that her work was below the standard expected of a GS-6 Tax Examiner.

The appellant has reiterated in her appeal to the Board that she was harassed and treated unfairly by her supervisor which lowered her production and increased her errors. The Regional Office discussed this and found no evidence to support appellant's contention. Since the appellant has failed to offer any evidence to substantiate this contention, the Board agrees with the Region's findings.

The Board has reviewed the record in light of all the contentions made by the appellant, but finds no basis for overturning the decision of the Region, which sustained the demotion action. In the Board's judgment, the finding of the Region is supported by substantial evidence. The Board, therefore, agrees with the Region that the appellant's change to lower grade from Tax Examiner, GS-6, to GS-4 was not arbitrary or capricious, but was warranted and was effected for such cause as will promote the efficiency of the service.

DECISION

The decision of the Commission's Atlanta Regional Office dated January 31, 1973 is hereby affirmed.

Under Civil Service Regulations the decision of the Board of Appeals and Review is final and there is no right to further administrative appeal.

For the Commissioners:

s/WILLIAM P. BERZAK
Chairman

June 27, 1973

UNITED STATES CIVIL SERVICE COMMISSION

Atlanta Region
Office of the Director

Atlanta, Georgia 30303

Appeal of Mrs. Lois H. Mitchell Under Part 752-B of the Civil Service Regulations

PART I—INTRODUCTION

Mrs. Lois H. Mitchell, the appellant, was demoted from the position of Tax Examiner, GS-6, to the position of Tax Examiner, GS-4, at the Internal Revenue Service Center, Chamblee, Georgia, effective July 9, 1972. The change to lower grade action is based on charges of failure to meet acceptable production requirements and an error rate in excess of acceptable quality requirements.

Mrs. Mitchell's appeal to this Regional Office is from the administrative decision, dated July 7, 1972, signed by Mr. William B. Hartlage, Acting Director, Internal Revenue Service Center, to effect the change to lower grade.

It has been established that this appeal comes within the purview of Subpart B, Part 752 of the Civil Service Regulations. By letter dated July 6, 1972, an appeal was made to this Regional Office from the decision, dated June 27, 1972, to effect the change to lower grade. The agency has contended that the appeal was untimely filed because the decision letter of June 27, 1972, was cancelled and replaced with the decision letter of July 7, 1972. We note that the letter of July 7, 1972, did not alter the decision to take the adverse action but simply changed the wording to describe the action as a reduction in grade rather than a reduction in rank. Therefore, we conclude that no useful purpose could be served in having the appellant submit an appeal from the decision letter of July 7, 1972. We find that the appeal was timely filed.

The appellant requested a hearing before a representative of the Civil Service Commission, which was conducted on November 2, and November 3, 1972, at the Internal Revenue Service Center, Chamblee, Georgia. A verbatim transcript of the hearing was prepared and has been made a part of the permanent record in this case.

PART II—ANALYSIS AND FINDINGS

A. Procedural Considerations

The following findings on regulatory requirements are made:

> The agency pointed out that the actual case records and control cards were not relied on to support the reasons and that the daily records kept by the supervisor were a part of the material assembled for the appellant's review. The agency representative stated that the actual case records have been stored and are not retrievable without considerable effort and would be voluminous, since more than one thousand cases are involved.
>
> We believe it to be apparent that case control cards and the records of actual cases are not essential to a defense against the charge of failure to meet acceptable production requirements. Also, in the light of the procedures followed in assigning errors to this employee, and after a review of the entire record in this case, we conclude that the actual cases and the control cards for each of the cases processed by the appellant are not necessary to defend against the charges. Our conclusion is based, in part, on the depth and detail of the defense made.

— As to the notice period

> The appellant was given at least a 30-day advance written notice and was retained in a duty and pay status during the notice period.

— As to the notice of adverse decision

> The reasons relied on for the action taken were set out in a written notice of decision which stated the effective date of the action and which was received by the appellant prior to such effective date.

On the above regulatory points, the procedures followed are considered to have been correct.

B. Substantive Considerations

The advance notice states the first charge, as follows:

> "Charge I: You have failed to meet acceptable production requirements.
>
> "*Specification 1:* During the period of May 7, 1971, through June 30, 1971, your average production rate was 2.27 adjustment cases per hour. This was 52.8% of the IMF Adjustment Section average of 4.3 adjustment cases per hour attained by GS-6 Tax Examiners during the quarter ending June 30, 1971.
>
> "*Specification 2:* During the quarter ending September 30, 1971, your average production rate was 1.48 adjustment cases per hour. This was 48.3% of the IMF Adjustment Section average of 3.19 adjustment cases per hour attained by GS-6 Tax Examiners during the quarter ending September 30, 1971.
>
> "*Specification 3:* During the period of the week ending October 8, 1971, through the week ending November 5, 1971, your average production rate was 1.06 adjustment cases per hour. This was 35.3% of the IMF Adjustment Section average of 3.0 adjustment cases per hour attained by GS-6 Tax Examiners during this same period."

With respect to Charge II, the advance notice sets forth three specifications; however, the decision letter informed

the appellant that specification 2 was found not sustained. Accordingly, no further consideration has been given to specification 2. Charge II and specifications 1 and 3, as set forth in the advance notice, are as follows.

> "Charge II: Your error rate was in excess of acceptable quality requirements.
>
> > "*Specification 1:* During the period of May 7, 1971, through June 30, 1971, your error rate was 12.5% You were informed in the warning notice of inefficiency dated May 6, 1971, that a 3% error rate was the maximum acceptable error rate.
> >
> > "*Specification 3:* During the period of the week ending October 8, 1971, through the week ending November 5, 1971, your error rate was 20.4%. You were informed in the warning notice of inefficiency dated May 6, 1971, that a 3% error rate was the maximum acceptable error rate."

In support of the charges, the agency submitted for the period in question, copies of the employee's Weekly Time Reports, copies of weekly computations of the average adjustment case production for the Adjustment Section and copies of daily review memoranda, which essentially set forth the appellant's work production, hours spent, rate of production, errors found and error rate. Included with the memoranda are daily reports with respect to the errors found, signed and dated by the appellant. The documentation includes a copy of a warning notice of inefficiency, dated May 6, 1971, addressed to the appellant, which informed her of the production requirement and acceptable error rate that is set forth in the advance notice. The appellant's supervisor, Mrs. Jeanette Perlinski, and the two employees who conducted the daily review of the appellant's work testified as to the procedures followed in accomplishing the review. Their testimony reveals that

from May 7, 1971, to November 2, 1971, all of the adjustment cases processed by the appellant were counted and reviewed, errors recorded, and records maintained with respect to daily production and errors found. The record shows that errors were discussed with the appellant and that, in some instances, errors were deleted after the appellant had explained her rationale for processing the case in that manner. It was pointed out that the employee's weekly time reports, and the daily review memoranda cannot be correlated with regard to production, because work processed by the appellant was not always reviewed on the same day that it was processed.

With regard to the production record, the appellant contended that on certain dates her production was erroneously recorded and that for the period from July 1, 1971 to July 9, 1971, the agency's summary reflected no production at all, although she had processed cases during that period of time. In this respect, it is stated that on May 26, 1971, her production was 18 cases whereas she was credited for 17; on June 28, 1971, her production was 12 cases and only 11 were reported; that during the week of September 2, 1971, her production was 24 cases and 19 are shown in the summary; that the week ending September 16, 1971, her actual production was 28 and she was credited with 27; and that during the period from July 1 through July 9, 1971, she processed a total of 74 cases which are not included in the production summary. In this respect, the record is not clear as to whether the time spent during the period from July 1, to July 9, 1971, is included in the computation of the appellant's average production rate per hour. The appellant also pointed out that during the week ending May 28, 1971, the supervisor had changed the employee weekly time report to reflect 43 cases processed, rather than 58 cases, as claimed by the appellant. We note that, although the appellant questioned the production requirement, no evidence presented shows that the requirement is unreasonable or improper.

In any case, it is apparent that the production claimed by the appellant would not bring her production rate up to the acceptable production requirement established by the agency.

It is contended that the appellant's production rate was adversely affected because she was on "100% review" from January to November 1971 (every case she processed was reviewed); that it was necessary that she spend significant periods of time explaining alleged errors; that the supervisor frequently interrupted her work to discuss cases with her; that she was required to use the micro-film machine in every case she processed and other employees were not required to do so; that she was assigned small batches of cases and selectively assigned the more difficult cases; that the section was given credit for cases which had not been actually produced and she was not given such extra credit; and that, in certain instances, she received credit for only one case when the supervisor could have credited her with more than one case because more than one adjustment document was involved.

We have carefully reviewed the evidence with regard to the appellant's contentions. The evidence shows that the appellant was notified in the warning notice of inefficiency, on May 6, 1971, that she was allowed 30 days from the date of the notice to bring her production up to the acceptable production requirement; that the 30 days' period was extended due to the appellant's illness and because of her failure to bring both the production rate and error rate up to acceptable standards.

The appellant's side pointed out that the agency's practice had been to discontinue the 100% review when an employee processed five batches of cases with an error rate of less than 3% and that the appellant had processed 94 cases with only 2 errors during the period from July 6, 1971 to July 16, 1971. However, the supervisor explained

that the appellant was continued on 100% review because she was under a warning notice of inefficiency which related to both production and error rate and that other employees were reviewed under different circumstances. Other employees expressed the opinion that a "100% review" for an extended period of time could create tension and pressure and adversely affect an employee's production.

It is our view that while such a review might create tension and pressure, a production requirement of 85% of the average rate for the section is not unreasonable. There is substantial evidence that other employees performed with a satisfactory error rate while under 100% review for lesser periods of time. In the circumstances present here, we conclude that the agency properly applied procedures the purpose of which were to measure the employee's level of performance. We recognize that any employee who has received a warning notice of unsatisfactory performance might be under some stress. However, such must be weighed against an agency's responsibility to evaluate its employees and particularly those whose performance is known or indicated to be marginal.

As to the contention that the appellant was assigned small batches of cases and selectively assigned the more difficult cases, the preponderance of the evidence shows that the appellant was assigned cases in the same manner as other employees and that cases were not selectively assigned to her because of the level of difficulty. The preponderance of the evidence also shows that use of the "micro-machine" is a requirement of the position and the evidence refutes the appellant's contentions that she was treated differently than other employees with respect to these matters.

With respect to the appellant's contention that other employees were credited with cases not worked, the preponderance of the evidence refutes that contention. In reaching this conclusion, we have considered that Mrs. Betty Ann

Malmberg testified with respect to a petition signed by 13 employees who protested because the Senior Tax Examiner in the appellant's work unit, Mrs. Evelyn Beaver was said to have been credited for cases she did not work.

As to the contention that the supervisor could have credited the appellant with a greater case count on the basis of the number of adjustment documents involved, the evidence shows that the method of counting cases produced was known to employees and that counts of the cases of other employees whose work was counted revealed no significant discrepancies. There is no evidence to show that a different procedure was applied when counting the appellant's production.

In summary, we find that the preponderance of the evidence sustains the charge that the appellant failed to meet acceptable production requirements and that the circumstances in mitigation, discussed above, failed to justify such failure.

With regard to Charge II, relating to the appellant's error rate, Mrs. Shirley Jeffries, the reviewer, and Mrs. Evelyn Beaver, who reviewed the appellant's work during Mrs. Jeffries' absences, explained the procedure followed in the review and assignment of errors. It was explained that each of the appellant's cases were reviewed and prospective errors discussed with her; that, in instances of disagreement, the prospective errors were discussed with the supervisor and, thereafter, either dropped as an error, or charged as an error, depending upon the supervisor's conclusions. Each confirmed that the same procedure was followed in the review of the work of all examiners. Their testimony was supported by that of Mrs. Perlinski, the supervisor. The evidence shows, further, that on at least one occasion the appellant complained to Mr. Aubrey Williams, Chief, Adjustment Branch, about alleged errors and that the errors were removed. However, Mr. Williams

essentially stated that he agreed with the reviewers but removed the errors to resolve the disagreement.

The appellant contended that she was charged with false errors and with insignificant errors. For example, she stated that she was charged with an error when she underlined the first four letters of a taxpayer's name and the line extended half way under the fifth letter of the taxpayer's name. She acknowledged that she should have underlined only the first four letters but stated that the error was insignificant since it was well known by everyone that only the first four letters were used in the alpha system. The appellant argued that in other instances, which she cited, she had properly processed the case and the reviewer and the supervisor had erroneously charged her with an error. However, the preponderance of the evidence shows that both Mrs. Jeffries and Mrs. Beaver were competent reviewers. We find no basis to conclude that the appellant was not fairly evaluated.

The appellant contended that the supervisor's behavior, as discussed earlier, and her treatment of the appellant constituted harassment. It is also alleged that Mrs. Perlinski deliberately set out on a course of action designed to force the appellant's resignation, either at the direction of, or concurrence of, management officials. In this connection, it is alleged that Mrs. Perlinski directed Mrs. Jeffries and Mrs. Beaver to charge the appellant with false errors, made unfavorable remarks concerning the appellant to others while professing to the appellant that she desired only to help her, refused to allow her to make telephone calls to taxpayers and relieved her of the assignment to deliver checks and bonds to other employees, hence, raising questions with respect to the appellant's character and integrity. However, the appellant offered no evidence to support her allegations. There is no evidence to show that there had been any conflict between the appellant and Mrs. Perlinski prior to her assignment under Mrs. Perlinski's

supervision and none to show that Mrs. Perlinski or management officials had expressed, or held, any animosity toward the appellant. Mrs. Jeffries, Mrs. Beaver, and Mrs. Perlinski denied that the reviewers were instructed to search for errors or to improperly assign errors to the appellant.

In summary, we find that the preponderance of the evidence sustains Charge I, Specifications 1, 2 and 3 and Charge II, Specifications 1 and 3. After a careful review of the record, we fail to find evidence to support a conclusion that the change to lower grade action is unreasonable, arbitrary or capricious.

PART III—DECISION

In our view, this appellant's change to lower grade based on the sustained reasons is for such cause as will promote the efficiency of the service. Accordingly, the appeal is denied.

PART IV—NOTIFICATION OF FURTHER APPEAL RIGHT

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U. S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

Attached is CSC Form 942 providing more detailed information about further appeals to the Civil Service Commission's Board of Appeals and Review.

For the Regional Director:

s/LYMAN C. DUNCAN, JR.
Regional Appeals Examiner

Dear Mrs. Mitchell:

This is a notice of proposed adverse action taken in accordance with Part 752 of the Civil Service Commission regulations. In order to promote the efficiency of the service, it is proposed to demote you from Tax Examiner, GS-592-6, Step 9 ($10,329 per annum) to a GS-4, step 10 ($8,506 per annum) position and to reassign you, in not less than thirty (30) full calendar days after you receive this notice, for the following reasons:

CHARGE I: You have failed to meet acceptable production requirements.

Specification 1: During the period of May 7, 1971, through June 30, 1971, your average production rate was 2.27 adjustment cases per hour. This was 52.8% of the IMF Adjustment Section average of 4.3 adjustment cases per hour attained by GS-6 Tax Examiners during the quarter ending June 30, 1971.

Specification 2: During the quarter ending September 30, 1971, your average production rate was 1.48 adjustment cases per hour. This was 46.3% of the IMF Adjustment Section average of 3.19 adjustment cases per hour attained by GS-6 Tax Examiners during the quarter ending September 30, 1971.

Specification 3: During the period of the week ending October 8, 1971, through the week ending November 5, 1971, your average production rate was 1.06 adjustment cases per hour. This was 35.3% of the IMF Adjustment Section average of 3.0 adjustment cases per hour attained by GS-6 Tax Examiners during this same period.

In the warning notice of inefficiency dated May 6, 1971, you were notified that your production level must be raised to at least 85% of the average of all

employees performing similar work at a like grade (GS-6 Tax Examiners) in the IMF Adjustment Section.

CHARGE II: Your error rate was in excess of acceptable quality requirements.

Specification 1: During the period of May 7, 1971, through June 30, 1971, your error rate was 12.5%. You were informed in the warning notice of inefficiency dated May 6, 1971, that a 3% error rate was the maximum acceptable error rate.

Specification 2: During the quarter ending September 30, 1971, your error rate was 14.3%. You were informed in the warning notice of inefficiency dated May 6, 1971, that a 3% error rate was the maximum acceptable error rate.

Specification 3: During the period of the week ending October 8, 1971, through the week ending November 5, 1971, your error rate was 20.4%. You were informed in the warning notice of inefficiency dated May 6, 1971, that a 3% error rate was the maximum acceptable error rate.

You have the right to answer the above charges, both personally and in writing, and to furnish affidavits in support of your answer. You may have a representative to assist you in the presentation of any oral reply that you may wish to make, and both you and your representative, if your representative is an employee of the Service, will be authorized official time to make the presentation.

The material relied on to support the charges and specifications in this letter is available for your review in the Personnel Office, Room 103, Atlanta Service Center, 4800 Buford Highway, Chamblee, Georgia.

A reasonable amount of official time, up to four hours, will be authorized you to review this material, to secure any affidavits you feel necessary, and to prepare your written reply.

If you wish official time for any of these purposes, your request should be submitted promptly to Mr. T. Cluderay, Personnel Officer, who will make the necessary arrangements. Your written reply or request for an oral reply must be submitted within ten (10) days from your receipt of this letter to the undersigned, P. O. Box 47421, Doraville, Georgia, 30340. Consideration will be given to extending this time limit and/or granting additional official time for preparation of your answer, if you make such requests, including your reasons for so requesting.

No final decision will be made in this matter until your reply, or replies, have been received and considered, or if no written reply is received or oral reply is requested, until after the time period specified has elapsed. Any replies submitted by you will be given full consideration, and you will be notified in writing of the final decision.

Pending a decision in your case, you will remain in a duty and pay status except for any approved leave.

Very truly yours,

s/DANIEL H. HOLLUMS
Director

Supreme Court, U. S.
FILED
DEC 12 1975
MICHAEL RODAK, JR., CLERK

No. 75-461

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOIS H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-461

LOIS H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erroneously dismissed her petition for relief from a demotion from a GS-6 to a GS-4 tax examiner because the procedures by which she was demoted violated due process and Civil Service Commission regulations.

On May 6, 1971, petitioner Lois H. Mitchell, a GS-6 tax examiner with the Internal Revenue Service (IRS), received a warning notice of inefficiency from that agency, apprising her of the fact that her error rate in reviewing federal tax returns was above the maximum acceptable level and that her production rate was below the acceptable level. She was

598-782—75

allowed thirty days to correct these deficiencies; the thirty-day period was thereafter extended due to petitioner's illness and her failure to bring her production and error rate up to acceptable standards.

On March 17, 1972, petitioner was informed by letter of a proposed adverse action, *i.e.*, demotion from GS–6, Step 9, to GS–4, Step 10. The letter stated that the demotion was based upon two charges: her failure to meet acceptable production requirements and an error rate in excess of acceptable quality requirements. Each charge was supported by three specifications (Pet. App. 20–21).

Petitioner made an oral reply to these charges on May 10, 1972, and on June 14, 1972, her counsel certified the accuracy of the transcript of this oral reply. Following consideration of the reply, IRS issued a decision on July 7, 1972, ordering petitioner's demotion.

Petitioner appealed the agency decision to the Atlanta Regional Office of the Civil Service Commission, where a hearing was held before an Appeals Examiner on November 2–3, 1972. The Examiner found that the agency had complied with all procedural requirements prescribed by Civil Service Commission regulations; that the charges lodged against the petitioner were supported by substantial evidence; and that the agency action was neither arbitrary or capricious (Pet. App. 9–19). This decision was affirmed by the Civil Service Commission's Board of Appeals and Review on June 27, 1973 (Pet. App. 4–8).

A petition was then filed with the United States Court of Claims which, on June 25, 1975, granted the

government's motion for summary judgment and dismissed petitioner's case. The court held that the adverse action against the petitioner was conducted in compliance with applicable statutes and regulations; that petitioner was not deprived of due process; and that the findings of the Civil Service Commission were supported by substantial evidence (Pet. App. 1–3).

The decision of the Court of Claims is correct. Further, this case raises issues which, because they turn on their particular facts, do not merit review by this Court.

1. Petitioner's primary contention is that she was not afforded an opportunity to review the actual tax returns (together with their identifying IBM "control cards") processed by her during the relevant period (*i.e.*, May 7, 1971, to November 5, 1971). As petitioner previously acknowledged and as the Court of Claims correctly found, the tax returns and control cards were not the basis of the administrative action (Pet. App. 2).[1] The demotion of petitioner was based upon her *rate* of error and *rate* of production, figures that were taken from daily work reports that set forth petitioner's work production, hours spent, rate of production, errors found, and error rate, and from weekly time reports and weekly computations of average case production (see Pet. App. 12–13). These doc-

[1] Petitioner's counsel stated (Admin. R., Part II, at 359): "We certainly agree that the control cards and the cases were not used as a basis for the proposed adverse action, and we didn't ask them for the information on that basis."

uments, numbering over 400 pages, were made available to petitioner (Pet. App. 12). Petitioner now claims, however, that the tax returns and control cards formed the basis of these daily and weekly summaries and that IRS's failure to produce this material for her review deprived her of due process by limiting her ability to respond (both in the oral reply before the agency and at the Civil Service Commission hearing) to the charges lodged against her.[2]

Petitioner's contention is without merit. The present procedure is reliable and fundamentally fair. See *Richardson* v. *Perales,* 402 U.S. 389, 402, 410. The essential records relied upon by IRS were the daily reports, which included the necessary information as to rate of production, errors, and rate of error. These reports were based on a daily analysis of petitioner's work; all of the cases she processed were counted and reviewed (Pet. App. 13). Petitioner herself had input in the preparation of the reports. All errors were discussed with petitioner before they were attributed to

[2] Petitioner contends that IRS's failure to produce the requested material also contravened 5 C.F.R. 752.202(a)(2), which provides in relevant part: "[T]he material on which the notice [of proposed adverse action] is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review this material." But as already noted, the returns and cards were not the basis of the notice of proposed adverse action, nor were they relied on to support the reasons in that notice. This argument fails, moreover, for the reasons elaborated below as to why the due process claim is without merit.

her (Pet. App. 16; see *id.* at 3). Petitioner had the opportunity to challenge any alleged error in her work product, and some disputes were resolved in her favor (Pet. App. 16–17). Thus, it was reasonable to rely on the accuracy of these daily and weekly reports.

Petitioner has given no reason to believe that the reports were materially flawed, nor has she shown how the returns and cards would have been helpful to her defense. She has argued that on certain dates her production was erroneously recorded (Pet. App. 13). But, as the Civil Service Commission found, even "the production claimed by [petitioner] would not bring her production rate up to the acceptable * * * requirement * * * " (Pet. App. 14). As to the claim that she made fewer errors than alleged, we reiterate that all errors were discussed with petitioner before they were charged to her. Moreover, petitioner could not prove her claim by reviewing the returns and cards, since all of petitioner's errors were corrected and the cases processed and stored without an indication that an error had been found. Finally, petitioner has argued that the reports do not reflect the fact that she was assigned cases which were more complex than average (see Pet. 10). It would seem impossible to verify a claim of comparative disadvantage merely by reviewing petitioner's own work. In any event, after an extensive hearing and review, the Civil Service Commission found that petitioner was assigned cases in the same manner as other employees, and that cases

were not selectively assigned to petitioner because of their level of difficulty (Pet. App. 15).

Furthermore, the cost of requiring the IRS to locate and retrieve the returns and cards would be substantial. Over 1,000 cases are involved; the "records have been stored and are not retrievable without considerable effort * * *" (Pet. App. 10). The burdens such a requirement would impose, combined with its nonutility, clearly outweigh petitioner's asserted belief that the returns and cards would be helpful in defending against her demotion. See *Arnett* v. *Kennedy,* 416 U.S. 134, 168 (concurring opinion of Mr. Justice Powell), 186 (opinion of Mr. Justice White concurring in part and dissenting in part).

2. Petitioner further contends that the agency's notice of proposed adverse action failed to provide her with sufficient specificity and detail concerning the charges to satisfy the requirements of 5 C.F.R. 752.202(a)(1).[3]

The notice, however, set forth the charges in detail and enumerated three specifications under each charge (Pet. App. 20–21). As the Court of Claims correctly found, petitioner's lengthy reply before the agency (which is contained in 60 pages of record and included a large number of documentary exhibits), indicates that she understood the charges sufficiently well to pre-

[3] 5 C.F.R. 752.202(a)(1) provides in relevant part: "[A]n employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action."

sent a full defense (Pet. App. 2). Accordingly, the charges set forth in the notice of proposed adverse action were sufficiently specific and detailed to meet the requirements of 5 C.F.R. 752.202(a)(1) and to afford petitioner a fair opportunity to oppose her removal. *Burkett* v. *United States,* 402 F. 2d 1002 (Ct. Cl.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976